

STATE OF MICHIGAN
COURT OF APPEALS

MELVINDALE-NORTHERN ALLEN PARK
PUBLIC SCHOOLS,

UNPUBLISHED
October 28, 2004

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

AFSCME LOCAL 1523 and JANICE WOLFE,

No. 248880
Wayne Circuit Court
LC No. 02-215531-CL

Defendants/Counter-Plaintiffs-
Appellees/Cross-Appellants.

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendants cross appeal from a circuit court order granting defendants' motion for summary disposition but denying defendants' request for back pay. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Janice Wolfe, a bus driver for plaintiff school district, was fired after testing positive for marijuana. The matter proceeded to arbitration as provided under the collective bargaining agreement (CBA). The arbitrator found it "undisputed that the Grievant did report to work under the influence of marijuana," but ordered reinstatement because another employee who had tested positive for a controlled substance had not been terminated. Plaintiff filed this action to vacate the award.

Plaintiff first contends that the arbitrator exceeded the scope of his authority by disregarding the law regarding disparate treatment. We disagree. While judicial review of cases referred to statutory arbitration under MCL 600.5001 *et seq.* includes considering whether the arbitrators acted in contravention of controlling principles of law, see *Gavin v DAIE*, 416 Mich 407, 434; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996), statutory arbitration does not apply to CBAs, MCL 600.5001(3). Cases involving collective bargaining arbitration are subject to different rules, *Roseville Community Sch Dist v Roseville Federation of Teachers*, 137 Mich App 118, 121-123; 357 NW2d 829 (1984), and judicial review is narrowly circumscribed. *Gogebic Medical Care Facility v AFSCME Local 992, AFL-CIO*, 209 Mich App 693, 696; 531 NW2d 728 (1995).

The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. [*Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989) (citations omitted).]

The court's function is to determine whether the award drew its essence from the CBA and was within the scope of the arbitrator's authority as set forth in the CBA, *Roseville Community Sch Dist*, *supra* at 123-124, not to review whether the arbitrator made errors of law or fact in interpreting the agreement. *Ferndale Ed Ass'n v School Dist for City of Ferndale #1*, 67 Mich App 637, 643; 242 NW2d 478 (1976).

Whether the award was within the scope of the arbitrator's authority cannot be determined because plaintiff has not provided the relevant portion of the CBA governing arbitration. Clearly, though, the arbitrator's decision drew its essence from the contract. The issue was whether plaintiff could fire Wolfe for reporting to work under the influence of drugs. Under the CBA, such action was grounds for discipline, including dismissal. However, the CBA also provided that "alleged discrimination in application of any work rule is a proper matter for a grievance by the Union." Defendants asserted that plaintiff had discriminated in the application of the disciplinary procedures for violation of the substance abuse policy by retaining another worker but firing Wolfe. The arbitrator agreed that the two women had been treated differently for the same misconduct and, thus, ordered Wolfe's reinstatement. Therefore, the merits of the arbitrator's decision were not subject to judicial review and the trial court did not err in denying plaintiff's motion.

Plaintiff also contends that the trial court's ruling should be reversed because the arbitrator's decision was contrary to public policy. We disagree.

As an exception to the general rule of judicial deference, we have recognized that a court may refuse to enforce an arbitrator's decision when it is contrary to public policy. . . . [H]owever, the United States Supreme Court cautioned that this exception "is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedent and not from general considerations of supposed public interest.' " [*Gogebic Medical Care Facility*, *supra* at 697 (citations omitted).]

It is the arbitrator's award, rather than his findings of fact or conclusions of law, that must be contrary to public policy before a court may refuse to enforce it. *Fraternal Order of Police, Ionia Co Lodge No 157 v Bensinger*, 122 Mich App 437, 448; 333 NW2d 73 (1983).

Certainly, state and federal laws governing controlled substances reflect a public policy against substance abuse and the harm it causes. However, plaintiff has not cited any law or regulation which specifically prohibits a school district from employing a person found to have driven a bus under the influence of controlled substances, at least where, as here, there is no evidence that Wolfe's commercial license has been revoked. To the contrary, 49 USC 31306(e) authorizes the establishment of rehabilitation programs to provide an "opportunity for treatment of operators of commercial motor vehicles who are found to have used alcohol or a controlled substance in violation of law or a Government regulation," to facilitate their return to work. See 49 CFR 40.281 *et seq.* Because the award reinstating Wolfe did not mandate illegal conduct or require plaintiff to act unlawfully, it did not contravene public policy. *Lincoln Park, supra* at 7-8. Accordingly, we find that the trial court did not err in granting defendants' motion for summary disposition.

In their cross appeal, defendants contend the trial court erred in denying their request for back pay from the date of the award, citing *United Steelworkers of America v Dayton-Walther Corp*, 657 F Supp 50 (SD Ind, 1986). That case is distinguishable in that it appears to have involved a separate action against the employer for failure to comply with the award rendered by an arbitrator, *id.* at 51-52, and apparently the back pay ordered from the date of the award was found to be the appropriate measure of damages for the employer's failure to comply with the award. *Id.* at 56. In addition, the arbitrator's award ordered the defendant to reinstate the discharged employee, yet the employer "plainly disregard[ed] and directly contraven[d] the arbitration award" by requiring the employee to first submit to a return-to-work physical exam and then refused to reinstate him based on the results of that exam. *Id.* at 53-54. In the present case, by contrast, Wolfe's reinstatement was conditioned on her taking and passing a drug screen and physical without making it clear who was responsible for initiating the testing. Because plaintiff did not plainly disregard and directly contravene the arbitrator's award, the trial court did not err in denying defendants' request for back pay.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra